

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



# 76-1230

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOCKET NO. 76-1230

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UNITED STATES OF AMERICA

APPELLEE

vs.

WILLIAM CARLO

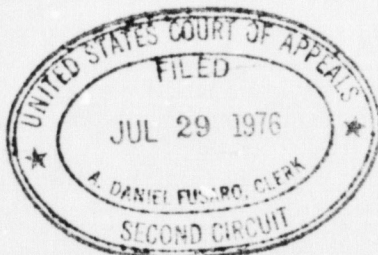
APPELLANT

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BRIEF OF APPELLANT  
WILLIAM CARLO

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- United States v. Watson, 489 F.2d 504 (3d Cir. 1973)

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\* The asterisk designates those cases upon which the defendant places chief reliance in the course of his argument.

STATEMENT OF THE ISSUES

1. Did the Court err in refusing to submit the issue of entrapment to the jury in light of evidence that the alleged criminal activity had been initiated by the Government and in light of further evidence that negated the claim that the defendant was "pre-disposed" to commit the crimes charged in this indictment.

2. More specifically, is the following evidence sufficient to show that the Government initiated the crimes charged in this indictment, thus supplying the first of two kinds of evidence needed for an entrapment defense:

- Prior to the dates of the offenses charged in this indictment, the defendant agreed to work for and with a local undercover agent to help in his law enforcement activities relating to narcotics and firearms.
- An informant for the federal government called Carlo and told him that a friend of his from Massachusetts wanted to buy handguns without papers.
- An undercover agent for the Bureau of Alcohol, Tobacco and Firearms (ATF) went to the defendant's residence and asked the defendant to sell him a handgun without papers.
- Two undercover agents for ATF returned to the defendant's residence and asked the defendant to sell them a second handgun without papers.
- The local undercover agent encouraged the defendant to "do whater he could for us" and to "see what he could do" to make arrangements with the federal undercover agents for a future illegal transaction involving the swap of grenades for handguns.

3. Is the following evidence sufficient to negate the defendant's pre-existing propensity or pre-disposition to commit the crimes charged in the indictment, thus supplying the second of the two kinds of evidence needed for an entrapment defense:

- The defendant had no criminal record.
- The defendant had a positive reputation in the community for being law abiding and his reputation for truth and veracity was also good.
- The defendant sold the guns to the federal undercover agent while operating in an undercover capacity for a local undercover agent.
- The defendant sold the guns to the federal undercover agents in an effort to show them he was "just as bad as they were" and to gain their trust so as to make arrangements for future illegal activity with the local undercover agent.
- The defendant sold the guns at less than market value to entice the federal agents into additional illegal activity.
- The defendant had reported the federal informant on prior occasions to local law enforcement agents for firearms violations.

STATEMENT OF FACTS

At 5:15 p.m. on July 11, 1974, Richard C. Dotchin, an undercover agent with the Bureau of Alcohol, Tobacco and Firearms (hereafter "ATF"), and Ted Bansak, an informant for the federal government, went to the home of William Carlo, a federally licensed firearms dealer who resided in Bridgeport, Connecticut. Bansak introduced Dotchin to Carlo as "Richie," a friend of his from Massachusetts who wanted to buy handguns without papers.

William Carlo sold "Richie" a handgun without filling out any of the forms or making any of the entries required of a federally licensed firearms dealer under federal law.

At 11:00 p.m. on July 22, 1974, Dotchin returned to Carlo's residence, this time in the company of Charles Peterson, also an undercover agent with ATF. Again, Dotchin requested Carlo to sell him a handgun without papers, and again, Carlo sold him the gun without doing the required paperwork.

Defendant's Version

In the spring of 1974, William Carlo, a gunsmith by profession and a federally licensed firearms dealer by avocation, entered into a relationship with his friend and customer, Officer C.J. Stites of the Bridgeport Police Department. At that time, Officer Stites was working as an undercover agent for the Connecticut Southwest Regional Crime Squad.

Stites asked Carlo to supply Stites with information con-

cerning any illegal activities Carlo became aware of in the course of his activities as a gunsmith and firearms dealer. Carlo perceived himself as being somewhat more than an informant and saw himself operating in an undercover capacity for Stites.

In the course of his activities as a gunsmith, Carlo had become acquainted with an individual by the name of Ted Bansak who approached him "frequently, sometimes two, three times a month, looking for illegal handguns, sometimes to try to sell (Carlo) illegal handguns, and even to the point of trying to sell me narcotics." (Tr. 87)

Carlo believed that Bansak was "an unsavory character" and he reported Bansak's activities to Officer Stites and to a friend of Officer Stites, Officer Charles Walkley of the Stamford Police Department, who also worked as an undercover agent with the Connecticut Regional Crime Squad. Carlo knew that Bansak was under investigation by local law enforcement agencies, including the Connecticut Regional Crime Squad.

On July 11, 1974, Bansak called Carlo and told him that he, Bansak, had a friend from Massachusetts who was interested in buying or trading firearms and that Bansak's friend "had at his disposal explosives and hand grenades." (Tr. 90)

Carlo told Bansak, "Yes, bring him over." Carlo told Bansak to bring his friend over so that Carlo could report this individual to Officer Stites.

The individual who arrived with Bansak was introduced as "Richie" and, according to Carlo, "seemed to be just about as crooked looking, as far as I was concerned, as Bansak was." (Tr. 92) He was "unkempt and unshaven" with long hair, dressed in blue jeans and an army fatigue jacket. "Richie" was actually Richard C. Dotchin, an undercover agent with the ATF. Dotchin intended to give Carlo the impression that he was a "nefarious character."

"Richie" said that he wanted to buy large calibre handguns without papers. Carlo told "Richie" that he did not have the kind of handguns that Richie was looking for, but Carlo told him that he did have some available that he could sell. Carlo referred to his phone conversation with Bansak and asked if he, "Richie" would be willing to trade some of his hand grenades for the handguns that he was looking for." "Richie" said that he was interested. (Tr. 93)

Carlo sold him a handgun without papers because Carlo was interested in keeping "Richie's" interest and wanted to make arrangements for the grenade deal. He sold the gun to "Richie" with the thought in mind of getting "Richie" to come back and make this transaction with Stites so that Stites could arrest him while in the possession of hand grenades. Carlo sold the handgun without papers because he wanted to show his good faith, because he wanted to pretend that he, Carlo, was just as bad as "Richie" was. (Tr. 93)

Carlo thought that it was all right to make this sale

because he was helping catch a criminal, and Carlo thought in order to help catch a criminal, he had to get his confidence. Carlo thought that because he was helping law enforcement, it would be all right.

Carlo sold the gun for \$50, considerably below the fair market value of the gun because he wanted to make sure that "Richie" came back again.

Carlo obtained the gun for the sale from his private collection because those were the only guns that he had that did not have papers.

Carlo informed Stites of the fact that he had met somebody who had grenades to swap for large calibre handguns. Stites encouraged Carlo to go right ahead and make arrangements for this deal. Stites was enthusiastic about the proposed transaction and told Carlo to do whatever he could to make arrangements for the swap.

On July 22, 1974, "Richie" returned with another individual and asked to buy more handguns without papers. Again, the topic of grenades came up and this time machineguns were also discussed. The two undercover agents instructed Carlo that they didn't want to do any dealing with paper work, and Carlo believed that if he required them to fill out the form, it would "turn them off" and the whole grenade deal would be off. (Tr. 108)

Carlo went up to his bedroom where he kept his private collection and returned with a derringer manufactured in the early part of the century which he then sold to the agents, again without papers.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on a four-count indictment after a jury sitting in New Haven, Connecticut returned a verdict of guilty on all four counts on March 24, 1976. The indictment charged the appellant with violations of Title 18, United States Code, Section 922 (b)(3), 922(b)(5), 922(m) and 924(a).

The defendant was subsequently sentenced to two years incarceration on each count, execution to be suspended after ninety days, and three years probation, the sentences to run concurrently.

The incidents which are the subject matter of this case occurred on July 11 and July 22, 1974. The appellant was indicted by a federal grand jury sitting in New Haven, Connecticut on June 25, 1975.

Originally, the indictment included nine counts, three of which dealt with another incident that occurred on June 20, 1975. On January 26, 1976, the appellant filed a Motion to Compel the Government to Elect between the three counts dealing with the June 20, 1975 incident and the other six counts dealing with the incidents that occurred in July, 1974.

On March 22, 1976, the Honorable Jon O. Newman, United States District Court Judge for the District of Connecticut, granted the defendant's Motion to Compel the Government to Elect. The Government elected to proceed on Counts 1-4 and Counts 7-8, those counts charging the appellant with violations of the National Gun Act of 1968, those violations allegedly occurring

in July, 1974.

The trial commenced on March 23, 1976, the jury having been impaneled previously, on February 24, 1976.

The Government relied exclusively on the testimony of Agents Richard Dotchin and Charles Peterson of the Bureau of Alcohol, Tobacco and Firearms for its case in chief.

The first witness for the defense was the defendant, William Carlo. Over the objections of defense counsel, the Government was permitted to cross-examine Carlo on subsequent similar acts on the ground that those acts were probative as to the defendant's claim that he was not criminally motivated but intended to help law enforcement. (Tr. 155-160)

Other defense witnesses included Officer C.J. Stites of the Bridgeport Police Department who substantiated Carlo's claim that Carlo had a working relationship with Stites in Stites' capacity as an undercover agent for the Regional Crime Squad and Officer Charles Walkley of the Stamford Police Department who testified that Carlo had in fact reported Ted Bansk to him for suspected illegal activities.

In addition to reputation testimony obtained from Officer Stites, the defense also presented three character witnesses to testify on William Carlo's behalf.

At the conclusion of the first day of the trial, the defense noted that the defense theory was "a derivative of entrapment" and added "It is sort of a combination of public duty defense and entrapment defense and justification defense."

Defense counsel reserved his right to request an entrapment instruction, noting "I would like to withhold my judgment on that, your Honor, until the morning. I think that, as I said earlier in the case, it may be in fact a quasi-entrapment or reliance similar to the Cox case in Alabama..." (Tr. 218)

At 8:30 a.m. the following morning, the defendant filed his Request to Charge which included a request for an entrapment instruction and a Memorandum in Support of the Defendant's Request to Charge. (See the Appendix)

The court denied the request for a charge on entrapment. The jury deliberated seventeen minutes before returning with a verdict of guilty on all counts.

ARGUMENT

Summary of Argument

The sole question posed in this appeal is whether the issue of entrapment should have been presented to the jury as was requested by the defendant in his Request to Charge (App.33) and in his Memorandum in Support of the Defendant's Request to Charge.<sup>1/</sup> (App.39)

The appellant respectfully submits that the trial court erred in refusing to instruct the jury on the law of entrapment. That instruction should have been given for two reasons:

(1) There was sufficient evidence to show that the Government initiated the criminal activity alleged in this indictment;

(2) There was similarly sufficient evidence to negate the defendant's pre-existing "propensity" or "pre-disposition" to commit the crimes charged in this indictment, thus making the issue of entrapment a question for the jury to resolve.

Under the bifurcated test first set forth by Judge Hand and adopted by the court in United States v. Sherman, 200 F.2d 880, 882-883 (2d Cir. 1952), as clarified by Judge Friendly in United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966), as further explained by Judge Kaufman in United States v. Dehar, 388 F.2d 430, 433 (2d Cir. 1968), and, as more recently applied

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<sup>1/</sup> The defendant framed his request for an entrapment instruction in the alternative. The charge approved by this court in Sherman and subsequently ratified in United States v. Berger, 433 F.2d 680 (2d Cir. 1970) was requested as well as the "preferred" charge outlined in United States v. Braver, 459 F.2d 790, 805 (2d Cir. 1971).

in United States v. Cohen, 431 F.2d 830, 832 (2d Cir. 1970),  
United States v. Anglada, 524 F.2d 296 (2d Cir. 1975) and  
most recently, in United States v. Swiderski, \_\_\_ F.2d \_\_\_  
(2d Cir. 1976), decided June 11, 1976, Docket Nos. 75-1422,  
75-1423, the appellant claims he was entitled to an entrap-  
ment instruction

THE COURT ERRED IN REFUSING TO  
PRESENT THE ISSUE OF ENTRAPMENT  
TO THE JURY.

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As Judge Friendly wrote in United States v. Riley, "So long  
as Sorrells stands,<sup>2/</sup> our problem is not whether entrapment  
should ever be submitted to the jury but when the evidence calls  
for doing so." supra at 957.

When considering whether an entrapment defense ought to be  
submitted to the jury, the trial testimony must be viewed in a  
light most favorable to the defendant, United States v. Dehar,  
supra at 433 (2d Cir. 1968), no matter how improbable this court  
might find the defense version of the facts, United States v.  
Watson, 489 F.2d 504, 507 (2d Cir. 1973) or how unreasonable the  
judge would consider a verdict in favor of the defendant to be,  
United States v. Riley, supra at 959. See Judge Kaufman's com-  
ments in Dehar, supra at 433-434.

This circuit has traditionally viewed the entrapment de-  
fense as being divisible into two distinct issues. As Judge  
Hand analyzed the defense in United States v. Sherman, "(1) did  
the agent induce the accused to commit the offence (sic) charged  
in the indictment; (2) if so, was the accused ready and willing

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<sup>2/</sup> Sorrells v. United States, 287 U.S. 435 (1927)

without persuasion and was he awaiting any propitious opportunity to commit the offence (sic)." Judge Hand went on to say that "On the first question the accused has the burden; on the second the prosecution has it." supra at 882.

1. There was sufficient evidence to show that the Government initiated the crimes alleged in this indictment.

In Sherman, Judge Hand defined "inducement" to include the mere "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." supra at 883. This circuit defined "inducement" further in United States v. Pugliese, 346 F.2d 861, 863 (2d Cir. 1965) and United States v. Jones, 360 F.2d 9, 96 (2d Cir. 1966), cert den 385 U.S. 1012 (1967) to mean only "the Government's initiation of the crime and not the degree of pressure exerted upon the defendant."

Judge Friendly added in Riley that "... it can be argued with some force that submission to the jury is demanded when-ever there is evidence that would warrant a finding of such initiation." (Emphasis added) supra at 958.

That quantum of evidence needed to satisfy the "inducement" branch of the entrapment defense was described even more completely in United States v. Braver, supra n. at 804-805:

... we are aware that the definition of inducement now in effect in this circuit requires so little evidence to satisfy the defendant's burden of proof, as it has been phrased up to now, that production of 'some evidence' of government initiation always satisfies it.

See also United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970)

where the court approved an instruction stating that the burden is on the defendant to adduce "some" evidence that a government agent initiated the illegal conduct.

It is clear, then, that the defendant's burden in showing "inducement" is "relatively slight." United States v. Henry, 417 F.2d 267, 269 (2d Cir. 1969) cert den 397 U.S. 953 (1970). It is also clear that the standard apparently adopted by the trial judge in this case -- "a preponderance of the evidence" (Tr.217) and "a fair preponderance of the evidence that there was an inducement to do the illegal activity" (Tr.219) -- was erroneous.

There can be little dispute that sufficient evidence was presented in the course of William Carlo's trial to satisfy the first element of the entrapment defense, government initiation. That evidence appears in both the Government's and the defendant's version of the offenses.

With respect to the July 11 sale, Richard C. Dotchin, the undercover agent for the ATF, testified that he was taken to William Carlo's residence by a government informant. At Carlo's house, the informant introduced Dotchin to Carlo as "a friend from Massachusetts who wanted to buy a gun without papers." (Tr. 17)

With respect to the July 22 sale, Dotchin testified that he returned to Carlo's residence with Charles Peterson, also an undercover agent with ATF, and told Carlo "that he wanted to purchase another firearm without papers." (Tr. 25)

On neither occasion did the defendant solicit the agents to make the sale; on each occasion, the defendant was approached by the agents who then initiated the illegal conduct.

The defendant's version of these sales only amplifies the testimony of the agents. Carlo testified that he did not fill out the required forms because, "The ATF agents instructed me that they didn't want to do any dealing with paperwork, and I figured if I required him to fill out the form, it would turn them off and the whole (grenade) deal would be off." (Tr. 108)

In addition to the clear-cut evidence that the ATF initiated the criminal activity alleged in this indictment, it is also apparent that Officer C.J. Stites of the Connecticut Regional Crime Squad played some role -- albeit unconsciously -- in "inducing" William Carlo to commit the crimes charged. Stites' relationship with Carlo is more directly relevant to the issue of Carlo's lack of pre-disposition, but that relationship also falls within the category of government inducement.

Whether Carlo first approached Stites about working for him or whether Stites asked Carlo is not important. More significant is the fact that a law officer entered into an agreement with Carlo, however, informal, to aid him in his law enforcement activities and then encouraged Carlo to "do whatever he could do for us..." (Tr. 183)<sup>3/</sup> According to Stites, he specifically told Carlo "to go ahead and see what he could do

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3/ Carlo testified that Officer Stites never explicitly forbade him from engaging in illegal activity in the course of his work for Stites. (Tr. 166) Under Dehar, the defendant's version must be accepted. In any event, it is not clear that Stites' instruction, if it was in fact given as Stites claims, was given before or after the illegal sales had already been completed.

in regards to making the introduction between the fellow who was selling the contraband and myself..." (Tr. 180)

According to Carlo, Stites "encouraged me to go right ahead and do it. He was enthusiastic about it and asked me to go ahead and make the arrangements for this transaction, that he would take it from there." (Tr. 102)

Standing alone, the activities of the ATF agents satisfy the "government inducement" branch of the entrapment defense; the appellant respectfully submits that the encouragement and incitement he received from Officer Stites at the other end amounts to additional, supplementary "government inducement."

2. There was sufficient evidence to negate the defendant's "propensity" to commit the alleged crimes, thus requiring the judge to submit the issue of entrapment to the jury.

Once the government's inducement or initiation of the crime has been established, the judge must charge the jury on the law of entrapment unless the accused's pre-existing propensity to commit that crime is established by "uncontradicted proof." United States v. Dehar, supra at 433. To state the same rule somewhat differently, submission of an entrapment defense to the jury is not required only if "uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense. In such cases, there is no real issue for the jury..." United States v. Riley, supra at 959.

As to the quantum of evidence needed to satisfy this branch of the entrapment defense, this circuit has been consistent: there need not be a "preponderance of evidence" or even a "fair preponderance of evidence;" there need not even be "substantial evidence;" there need only be some evidence negating propensity to warrant an entrapment instruction.

As this court said in Riley and repeated in Dehar, "... the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be." (Emphasis added) 363 F.2d at 959 and 388 F.2d at 433.

Close analysis of United States v. Riley, supra, illustrates just how minimal the evidence negating propensity must be to warrant an entrapment instruction. In Riley, the court ordered that the jury be instructed on the law of entrapment based on Riley's own testimony (1) that the agent solicited the drugs by claiming that the agent and his wife were sick and in need, (2) that Riley received no fee for his services apart from a small portion of the narcotics to sustain his own habit, and (3) that Riley had never sold drugs before and did not act as a seller in this transaction.

Similarly, in the more recent case of United States v. Anglada, supra, also a "typical narcotics transaction," the court concluded there was sufficient evidence to negate the

defendant's predisposition based, in part, on the fact (1) that Anglada made no profit from the transaction, (2) that there was no evidence of prior drug selling by Anglada, and (3) that there was no evidence of a "previously formed intent to commit the crime."

For other applications see United States v. Cohen, supra, United States v. Watson, supra, and, most recently, United States v. Swiderski, supra.<sup>4/</sup>

With respect to William Carlo, more than sufficient evidence was presented to negate the Government's claim that Carlo was predisposed to commit the crimes charged in this indictment.

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4/ In those cases where the trial judge's refusal to give an entrapment instruction has been upheld, there was, in fact, absolutely no evidence to negate the defendant's criminal predisposition. In United States v. Bishop, 367 F.2d 806, 810 (2d Cir. 1966), the only evidence to contradict "propensity" was the fact that the defendant had no criminal record. That fact alone was insufficient, the court held, to satisfy the requirements of the entrapment defense.

In United States v. McMillan, 368 F.2d 810 (2d Cir. 1966) cert den 380 U.S. 909 (1967), the defendant did not testify and "there was evidence of a prior narcotics sale by the defendant."

In United States v. Henry, supra, the defendant had "previously offered to arrange sales of heroin."

In United States v. Greenberg, 444 F.2d 369 (2d Cir. 1971) cert den 404 U.S. 853 (1971) the defendant "grasped at the opportunity."

In United States v. Nieves, 451 F.2d 836 (2d Cir. 1971), the court concluded that the evidence was uncontradicted that the defendants were willing to supply large quantities of cocaine.

(Continued)

To begin with, the defendant, at the time of the trial and at the time the offenses occurred, had no criminal record to speak of. Although not sufficient under Bishop, supra, to constitute by itself evidence negating propensity, the defendant's lack of a criminal record and the absence of any evidence to show that the defendant engaged in prior similar acts should not be totally discounted. In fact, in Riley, Dehar and Anglada, the court specifically took the defendant's lack of past criminal activity into account in its discussion of evidence negating propensity.

In addition, Carlo presented the character testimony of four witnesses, one of them an officer with the Bridgeport Police Department (Tr.191), as to Carlo's unblemished reputation in the community for honesty, truth and veracy. Rather than relying merely on a lack of a criminal record to show his law abiding qualities, Carlo shouldered the burden of establishing those qualities with positive testimony. There was testimony, for example, of incidents in the past when Carlo had been scrupulous in obeying the letter of the law. (Tr. 191)

Over and above Carlo's unblemished reputation, the absence of any past criminal activity, and positive evidence of Carlo's

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4/ (Continued) In United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), the defendant was "fully prepared to complete the transaction on the very first occasion."

And, most recently, in United States v. Licursi, 525 F.2d 1164 (2d C.r 1975), the "appellant's testimony did not contradict the evidence that he was predisposed to commit the offense charged and there was no other evidence negating propensity." at 1169.

law abiding nature, there was additional evidence -- in the defendant's testimony and in the testimony of Officer C.J. Stites -- to negate the appellant's propensity to commit the specific crimes charged in this indictment.

Most simply put, William Carlo claims that, absent the relationship he had established with Officer Stites of the Regional Crime Squad, he would not have sold the firearms to the ATF undercover agents without complying with the book-keeping requirements imposed by federal law. Carlo contends that his apparent predisposition to make the illegal sales was itself the product of his relationship with Stites in that Carlo sold the guns in a good faith effort to set-up a future illicit transaction which would permit to apprehend the undercover agents, whom Carlo perceived to be "bad guys", while they were in possession of grenades.

In support of his theory, Carlo testified that he knew that the government informant who introduced him to "Richie" was, himself, an "unsavory character" and the subject of a criminal investigation by the regional crime squad. Carlo knew this because he had reported the informant, Ted Bansak, to law enforcement officers himself -- evidence tending to negate Carlo's predisposition to commit these crimes. Carlo had also learned from various sources in law enforcement that Bansak was under investigation.

In Carlo's opinion then, Bansak was "crooked." When Bansak appeared with "Richie," Carlo assumed with justification

that "Richie" was also involved in illegal activities. "Richie's" dress and appearance -- unkempt, blue jeans, long hair, an army fatigue jacket -- and his conduct were specifically intended to convey to Carlo that "Richie" was indeed a "nefarious character."

Carlo also sold the guns for \$50 apiece, a price considerably below the fair market value of the guns, in order to entice the buyer into making arrangements for a future swap of handguns for grenades, the handguns to be supplied by Carlo's friend, Stites, the grenades to be supplied by "Richie." Carlo assumed that Stites would then arrest "Richie" at the time of the swap. The purpose of the illegal sales was to show "Richie" Carlo's good faith and reliability to persuade "Richie" to agree to the grenade deal.

The appellant claims, in short, that his ordinary, law-abiding nature was overcome by a combination and a coincidence of two factors -- the approach from Bansak and "Richie" preceded by his relationship with Stites.

Viewing the transaction in isolation, the appellant concedes that there is no visible evidence to negate a pre-existing propensity on Carlo's part to commit the crime. There is no evidence, for example, that Carlo was at all reluctant to make the sale, that he refused to make the sale before capitulating, or that Carlo was the object of persuasion by the undercover agents. These facts, however, give more rather than less credence to the appellant's claims for the following reason: if Carlo were in the regular business of dealing in firearms transactions, it

would be fair to expect that he would have been more cautious about his customers, particularly if they are in the company of an individual Carlo knows to be the subject of investigations by local law enforcement agencies.

The appellant contends that his willingness, his eagerness to make the sales, his apparent pre-disposition to commit the crimes charged was, in fact, only a pose and a sham to entice "Richie" of the underworld into future illegal activity in the presence of Officer Stites.

When faced with the question of an individual's pre-disposition to commit crimes, the court must inevitably deal with concepts like "state of mind" and "intent." The appellant submits that evidence showing that the defendant had no criminal intent, that the defendant's conduct was not criminally motivated, and that the defendant's state of mind was in fact other than what it appeared to be -- this type of evidence plainly negates criminal pre-disposition.

In addition to Carlo's lack of criminal record and in addition to the positive testimony of the character witnesses as to Carlo's reputation for truth, veracity and law-abiding conduct, the following is additional evidence to negate Carlo's pre-existing propensity to commit the crimes charged:

1. Carlo testified that he knew on July 11 that Bansak was the subject of investigations by local law enforcement authorities. (Tr. 88-89)

2. Carlo testified that on July 11 he discussed the possibility of trading hand grenades for large calibre handguns, the grenades to be supplied by "Richie", the handguns

to be supplied by Carlo's "friend" Stites. (Tr. 91, 99-100, 125-126)

3. Carlo testified that he was primarily interested in selling the handguns "just to keep his ("Richie's") interest." (Tr. 93)

4. Carlo testified that he sold the handgun to "Richie" "with the thought in mind of getting him to come back and make this transaction (with Stites) with the hand grenades... I wanted to show him good faith on my part. I wanted to pretend I was just as bad as he was." (Tr. 93)

5. Carlo testified that Officer Stites asked Carlo if he (Carlo) would be willing to help him, "he would appreciate it if I could point out some of these people who did these illegal things..." (Tr. 97)

6. Carlo reported Bansak at one time to Stites (Tr. 98, 179) and on another occasion to Officer Charles Walkley, also of the Connecticut Regional Crime Squad. (Tr.

7. Carlo testified that he sold the gun to the agents for \$50 when the fair market value was really "about one hundred dollars." (Tr. 101)

8. Carlo testified that he sold the gun to the agent at that low price because "I wanted him to buy it" because Carlo was "getting Richie to agree to make this (grenade) deal with me, and I wanted to convince him that I was of good faith." (Tr. 101)

9. After the sale, Carlo contacted Officer Stites and told him about the proposed arrangements with Richie. (Tr. 101)

10. Carlo testified that Stites "encouraged me to go right ahead and do it. He was enthusiastic about it and asked me to go ahead and make the arrangements for the transaction..." (Tr. 102)

11. Carlo told Stites "what had transpired" after the second sale. (Tr. 103)

12. Carlo testified that he "thought it was all right to make the sales" (Tr. 104) because he "was helping catch a criminal and in my mind I thought in order to help catch a criminal, I had to get his confidence and make him think that I was just as bad as he was." (Tr. 104)

13. Carlo testified that at the time he made the sales he didn't think it was illegal "because he was helping law enforcement and it would be all right."

12. Carlo testified that he thought he was "operating, in effect, as an undercover agent for Stites." (Tr. 115)

13. Carlo testified that he thought he was working on behalf of Stites to "provide a case or something that would develop." (Tr. 161)

14. Carlo testified that Stites asked Carlo to help him out in this. (Tr. 166)

15. Carlo testified that Stites never told Carlo not to break any laws. (Tr. 166)

16. Stites testified that Carlo informed him of the possible grenade-handgun swap being arranged by Carlo with "Richie." (Tr. 179)

17. Stites testified that he told Carlo that he "would be very interested to meet this person and attempt to purchase these grenades" and that Carlo ought "to go ahead and see what he could do in regards to making the introduction between the fellow who was selling the contraband and myself..." (Tr. 180)

18. Stites testified that Carlo talked to Stites about the grenades deal on more than one occasion. (Tr. 180)

19. Stites testified that he told Carlo that "we would like him to do whatever he could for us..." (Tr. 183)

20. Stites testified that he obtained verbal permission to go ahead from his supervisor and then went back and told Carlo to go ahead. (Tr. 193)

From this testimony, it is clear that there is evidence to show that Carlo's apparent pre-disposition to commit the crimes alleged was, in fact, a pretense ("I wanted to pretend I was just as bad as he was" Tr. 93), an attempt to make the criminal, "Richie," "think that I was just as bad as he was." (Tr. 104). In turn, Carlo's pretense was the product of his relationship with Stites and the fact that Carlo thought that he "was operating, in effect, as a sort of undercover agent for Stites." (Tr. 115)

The appellant respectfully submits that this was sufficient evidence to negate the appellant's predisposition to commit the crimes charged, thus requiring the issue of entrapment to have been presented to the jury.

CONCLUSION

For all of the reasons set forth above, the appellant respectfully requests that the judgment of conviction be vacated and that this case be remanded for a new trial.

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CERTIFICATION

The undersigned hereby certifies that a copy of the Appellant's Brief and Appendix to the Brief have been sent postage pre-paid to the Office of the United States Attorney, Post Office Box 1824, New Haven, Connecticut, this, the 28th day of July, 1976.

Gregory B. Craig  
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